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In The

Supreme Court of the United States

October Term, 1978

No. 78-1326

ANTHONY LA DUCA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEVEN H. GIFIS
Attorney for Petitioner
68 Bayberry Road
Princeton, New Jersey 08540
(609) 466-3550

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In The

Supreme Court of the United States

October Term, 1978

No.

ANTHONY LA DUCA

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 14, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is appended to this petition as Appendix A. It is as yet unreported. The opinion of the United States District Court for the District of New Jersey is appended to this petition as Appendix B. It is reported at *United States v. LaDuca*, 447 F. Supp. 779 (D.N.J. 1978).

JURISDICTION

The jurisdiction of the Supreme Court to review the final judgment of the United States Court of Appeals for the Third Circuit is based on 28 U.S.C. §1254(1).

ORDER DENYING REHEARING AND ORDER EXTENDING TIME TO FILE PETITION FOR CERTIORARI

A timely petition for rehearing was filed with the United States Court of Appeals and denied by order entered on December 27, 1978. Thereafter, an application was made to Associate Justice William Brennan seeking an extension of time within which defendant could timely file the within petition for certiorari. On February 13, 1979 Justice Brennan entered an order extending defendant's time to petition this Court for certiorari until February 25, 1979.

QUESTIONS PRESENTED

1. When, after the defendant unsuccessfully attempted to subpoena a pleading co-defendant, the defendant then acquired the court's assistance in summoning the witness; the court had notice as to the purpose and scope of the witness' proffered testimony; the defendant mentioned placing the witness on the stand; and the court excused the witness, thereby implicitly ruling that the defendant was protected from testifying by the Fifth Amendment; did the defendant fail to exercise due diligence under Fed. R. Crim. P. 33 by not insisting upon a full judicial inquiry into the validity of the witness' assertion of his privilege against self-incrmination?

2. When, after the defendant unsuccessfully attempted to subpoena a pleading co-defendant; the defendant then acquired the court's assistance in summoning the witness; the defendant mentioned to the court placing the witness on the stand; and the

court implicitly ruled that the witness was protected from testifying by the Fifth Amendment; did the defendant fail to exercise due diligence under Fed. R. Crim. P. 33 by not requesting the government and the court to confer on the witness use immunity under 18 U. S. C. §§6001, *et seq.*?

STATEMENT OF THE CASE

On January 23, 1976, Anthony LaDuca was convicted by a jury of aiding and abetting one John Neiman's willful misappropriation of monies of the Paper Industry Union Management Pension Fund in violation of 18 U.S.C. §664. On direct appeal, the conviction was affirmed, *United States v. LaDuca*, 546 F.2d 417 (3d Cir. 1976), and, after the government was directed to respond, petition for certiorari was denied, 430 U.S. 965 (1977). In October 1977 the defendant filed a motion for a new trial on the grounds of newly discovered and/or available evidence — to wit, the testimony of his pleading co-defendant, John Neiman, who invoked legitimately his Fifth Amendment privilege against self-incrimination when originally called to testify. The district court denied the motion; the circuit court affirmed the denial on different grounds and denied a motion for rehearing. The defendant has fully served an eighteen month custodial term. He nonetheless continues to assert his innocence and seeks review in this Court so that a new trial can be had wherein that claim of innocence may be vindicated.

LaDuca, Neiman and two others were indicted by the federal grand jury on February 3, 1975, on several counts, including conspiracy, misappropriation of pension funds, and misapplication of bank funds. Neiman, under a plea bargain, pled to the conspiracy charge on November 24, 1975. LaDuca was tried alone starting on January 19, 1976, and found guilty four days later. (Charges against the other co-defendants were dropped.) Neiman was sentenced on the conspiracy count and the remaining counts against him were dismissed on March 1, 1976.

LaDuca's trial strategy depended upon the introduction of statements by Neiman to the effect that LaDuca had no knowledge of the illegal source of the funds Neiman supplied to initiate a real estate venture. Since Neiman had pled, LaDuca anticipated that the government would call him to testify, at which time LaDuca planned to elicit the exculpatory statements. LaDuca planned either to impeach any denials or to support any affirmations with the testimony of two attorneys who were present when Neiman made statements exculpating LaDuca (T2.114-18 to T115-20).[1] In an extended discussion with the trial court concerning the proffered testimony of the two attorneys, it became evident that the government was not going to call Neiman (T2.118-2 to 4). The court then ruled that the testimony of the attorneys would not be admitted and said that if LaDuca wanted to introduce Neiman's statements LaDuca should call Neiman (T119-13 to T120-1).

To acquire Neiman's testimony, LaDuca first tried to subpoena Neiman. Having sent his brother to effect service, but not being able to determine the witness' whereabouts, LaDuca then enlisted the court's aid and had Neiman summoned to appear (T216-25 to T218-18). Once Neiman was present (T3.2-1 to 4), his counsel, Mr. Greenberg, fervently attempted to expedite his exit. Before the court was ready to call the witness, Greenberg interrupted the proceedings and brought to the court's attention Neiman's intent to raise his privilege (T3.4-17 to T3.5-7). After some discussion of whether Neiman had intended to testify, the court then asked him a single question about whether he would invoke his privilege. Neiman immediately said he would (T3.7-25 to T3.8-2). Defense counsel

1. "T" refers to transcript of the trial proceedings. No testimony was taken on the motion for a new trial. The two lower courts relied exclusively upon the papers in the matter which included a set of original affidavits, an opposing affidavit from the government, and a further affidavit which was appended to defendant's supplemental memorandum of law filed at the direction of the trial court.

then questioned the court about the procedure to be followed, explicitly mentioning putting Neiman on the stand (T3.8-13 to 14). After some continued discussion, Greenberg again pressed for his client to be excused. After a moment, the court granted the request (T3.12-9 to T3.14-2). Thus, following its informal voir dire concerning Neiman's privilege, the court implicitly ruled on its validity by excusing the witness.

The defense, having lost its key witness and having been denied the alternative means of introducing the key testimony, was desperate in the wake of Neiman's excusal. Shortly after the witness left the courtroom, the defense made a last, desperate attempt to get the testimony, suggesting that perhaps Neiman no longer had a privilege since he had made a plea bargain and that bargain would be enforceable (T3.14-23 to T3.15-6). The court correctly recognized that other counts of the same indictment were still outstanding against Neiman, and that these could form the basis for a claim of privilege (T3.21-7 to 14). The defendant later conceded the point (T3.82-17 to 24).

In October 1977, LaDuca moved for a new trial pursuant to Fed. R. Crim. P. 33 on grounds of newly-discovered/available evidence.[2] In support of his motion, he offered several affidavits. Affiant John Neiman swore that LaDuca had no knowledge of the illegal source of the funds and that his jeopardy being no longer existent he would be willing to testify on the behalf of LaDuca (App. C, 35a, 38a, ¶ ¶ 6, 14). Affiants Feinstein and Querques swore that in a pre-trial strategy session Neiman made statements that LaDuca had no knowledge of the illegal source

2. It is commonly held that five requirements must be met before a new trial will be granted on grounds of newly-discovered evidence: 1) the evidence must have been discovered since the trial ended; 2) the defendant must have exercised due diligence in trying to discover the evidence before or during trial; 3) the evidence may not be merely cumulative or impeaching; 4) the evidence must be material to the issues involved; 5) the evidence must be of such a nature that on retrial it would probably produce an acquittal. *See, e.g., United States v. Ianelli*, 528 F.2d 1290 (3d Cir. 1976).

of the funds. Affiant Vort swore that during January 1974, he overheard a conversation between LaDuca and Neiman in which Neiman repeatedly assured LaDuca of the legality of funds obtained by Neiman and that he did not inform LaDuca of his eavesdropping until after he had learned of LaDuca's conviction. Affiant Salvatore LaDuca, the defendant's brother, swore to his attempt to serve the witness Neiman with a subpoena at Neiman's home in Doylestown, Pennsylvania. Finally, affiant LaDuca swore that he had no knowledge of the source of the funds and that his trial defense was based upon Neiman's testimony exculpating him.

The trial court denied LaDuca's motion on the grounds of the defendant's failure to exercise due diligence in attempting to introduce Neiman's testimony. Regardless of the facts that the defendant planned his trial strategy around Neiman's testimony, had Neiman brought to court and mentioned putting Neiman on the stand, the district court faulted the defendant for failure to make the innovative request that the government confer use immunity on the witness under 18 U.S.C. §§6001, *et seq.* On appeal, the circuit court affirmed on different grounds. The circuit court disavowed the lower court's reasoning but still faulted the defendant for not exercising due diligence. Despite the trial court's and the witness' knowledge of the scope and nature of the questions to be asked; despite the trial court's informal voir dire and implicit ruling on the validity of Neiman's privilege; despite the clarity of the case law to the contrary; the circuit court faulted the defendant for not insisting upon a full exploration of Neiman's privilege and its validity.[3]

3. The circuit court also suggested that Neiman's testimony would not "probably produce an acquittal." Since this issue was not argued by the parties below, and since no court below ever explored the issue and made a finding on it, should this Court deem the issue important to the ultimate granting of a new trial, the case should be remanded for its proper consideration.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted because the court below, in ruling that defendants failed to exercise due diligence by not insisting upon a full exploration of the co-defendant's privilege, cast doubt upon the scope of the Fifth Amendment privilege as settled by numerous decisions of the federal courts.

In faulting the defendant for not fully pursuing the issue of whether Neiman had a privilege at that time, the Circuit Court of Appeals stated that "the issue [of Neiman's privilege] was not clear-cut at that time." (App. A, 9a). Such a finding is not only contrary to the facts in the case but also to the holding of numerous federal courts. Neiman had several valid grounds, recognized by our courts, for his privilege — exposure to sentencing; exposure to the other counts of the indictment; a right of appeal; and exposure to possible state charges.

The trial court was well aware of at least two of these grounds, since it had taken Neiman's plea and had yet to sentence him. The trial court also well knew of the purpose for which Neiman was to be called since it was discussed when LaDuca proffered the testimony of the two attorneys. When the court *sua sponte* asked Neiman the single question about invoking his privilege, Neiman's response was direct. Although the procedure involving Neiman's raising his privilege was irregular, that irregularity is manifestly due to the trial court's impatience with an obvious point of law. Indeed, the trial court ignored LaDuca's suggestion that Neiman be placed on the stand. Under such circumstances, it is unquestionable that all parties present were satisfied that the circumstances surrounding Neiman's criminal liability formed sufficient basis for his assertion of privilege.[4]

4. The defendant's later attack upon Neiman's privilege clearly lacks merit as a matter of law and can only be viewed as the efforts of a desperate defendant grasping for straws when his primary trial strategy was destroyed by Neiman's assertion of privilege.

The case law fully supports the trial court's recognition of Neiman's privilege. If defendant pursued the legal argument the Third Circuit suggests, he would be arguing against not only the settled case law of that jurisdiction but of all the federal courts. In the Third Circuit's leading case on the issue, *United States v. Mahady & Mahady*, 512 F.2d 521, 525 (3d Cir. 1975), the court upheld a lawyer's assertion of the privilege when summoned by the IRS to testify about certain financial transactions because such testimony could have supported federal revenue prosecutions. In so holding, that court said that the privilege may be invoked by a compelled witness "when his answers to questions 'might incriminate him in future criminal proceedings,'" quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The court also emphasized that "the self-incrimination privilege 'must be accorded liberal construction in favor of the right which it was intended to secure,'" quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Since then, the courts of the Third Circuit have consistently found valid assertions of the privilege even after the defendant had pled guilty. Relying upon *Mahady*, the court in *United States v. Matthews*, 417 F. Supp. 813, 819 (E.D. Pa. 1976), held that the privilege still obtained to a pleading co-defendant called as a witness when two counts of the indictment were still open against him and the plea bargain had not yet been formally accepted by the court. In *United States v. Garcia*, 544 F.2d 681, 684-86 (3d Cir. 1976), the court found that the privilege obtained when a pleading defendant still had to be sentenced and was still exposed to additional criminal charges outside the indictment. Indeed, as the Third Circuit panel indicated in its opinion herein, the court followed the same judicial reasoning in *United States v. Yurasovich*, 580 F.2d 1212 (3d Cir. 1978). There, the court upheld the defendant's assertion of the privilege when, after having pled guilty to two counts of tampering with the mails, the defendant was still exposed to a possible conspiracy indictment in the same district and to possible similar charges in another district.

The bulk of federal law is consonant with the holdings of the Third Circuit's case law. Defendants, after having been

found guilty of some charges and having pled guilty to others, have been found to still have a privilege when grand jury testimony about the same events could have led to additional charges. *United States v. Miranti*, 258 F.2d 135, 136-38 (2d Cir. 1958). A defendant has been held to have a privilege when still exposed to a federal or state conspiracy charge and when testimony could provide clues to other illegal transactions. *United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973). A pleading defendant has been held to have the privilege when still exposed to additional criminal charges. *United States v. Franz*, 469 F.2d 76, 77 (9th Cir. 1972); *United States v. Stephens*, 492 F.2d 1367, 1374 (6th Cir. 1974), *cert. denied*, 419 U.S. 852; *United States v. Ward*, 314 F. Supp. 261 (E.D. La. 1970). Indeed, a defendant has been found to retain the privilege even after acquittal, when he was still exposed to possible charges. *United States v. Malnik*, 348 F. Supp. 1273, 1276 (S.D. Fla.), *aff'd*, 489 F.2d 1407 (5th Cir. 1972).

In addition to cases of continued criminal exposure, the federal courts hold that the privilege still obtains after the trial disposition of the case when judicial proceedings concerning the case are still in progress. The fact that an appeal is pending has been deemed a relevant factor in determining the existence of the privilege. *United States v. Hains*, 542 F.2d 1283, 1298 (7th Cir. 1976), *cert. denied*, 430 U.S. 934. Also, when appeal was pending and retrial was a possibility, the privilege remains viable to a defendant. *Ottomano v. United States*, 468 U.S. 269, 273-74 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128; *Prentice v. Hsu*, 280 F. Supp. 384, 388 (S.D.N.Y. 1968).

Any cases which might be cited to the contrary are easily distinguishable. A line of Second Circuit cases have suggested, *in dicta*, that a pleading defendant might not have a privilege. *United States v. Cioffi*, 242 F.2d 473, 477 (2d Cir. 1957); *United States v. Romero*, 249 F.2d 371, 375 (2d Cir. 1957); *United States v. Gernie*, 252 F.2d 664, 669 (2d Cir. 1958). But, in each of these cases, not only was the witness successful in invoking his

privilege in the trial court, *Cioffi*, 242 F.2d at 476; *Romero*, 249 F.2d at 375; *Gernie*, 252 F.2d at 669, but the alternative bases for the privilege (state charges, sentencing and appeal) were not considered. The only other case supporting a lack of privilege theory involved a witness invoking the privilege on cross-examination—after he testified voluntarily on direct examination. *United States v. Hoffman*, 385 F.2d 501, 505 (7th Cir. 1967). Additionally, this case wars with the liberal view demonstrated by a more recent case from the same circuit. *See Hains, supra.* The circuit court in its opinion suggests that Neiman might not have a privilege since, under *Santobello v. New York*, 404 U.S. 257, 263 (1972), he would be entitled to specific performance of his plea bargain. This suggestion ignores the fact that Neiman's plea bargain only extended to the dismissal of the remaining counts, and not the sentence to be received upon his guilty plea, and also ignores the other bases of criminal exposure.

It is clear that Neiman, under the settled case law of the federal courts, had a valid privilege to assert. As is evident from the number of opinions on the issue, the question is a recurrent one important to both prosecutors and defendants. A writ of certiorari should issue so that this court can prevent any incursion upon the privilege against self-incrimination which the circuit court's opinion would allow.

II.

Certiorari should be granted so that this Court can give guidance to divided federal courts on the resolution of the recurrent issue under Fed. R. Crim. P. 33 of a defendant who originally invokes his Fifth Amendment privilege against self-incrimination but later indicates willingness to testify on behalf of a co-defendant once his original criminal exposure has passed.

The contrary positions of the district court and the circuit court demonstrates that the federal courts lack any definite and rational way to decide what the district court recognized as a "recurring and troublesome question: Under what circumstances will a new trial be required where an individual who has invoked the privilege against self-incrimination and has not testified at the trial of his co-defendant comes forward after trial and conviction of his co-defendant and purports to be able and willing to give testimony exculpatory of him." *United States v. LaDuca*, 447 F. Supp. 779, 781 (D.N.J. 1978) (App. B, 13a).

Courts have devised various solutions in dealing with new trial motions presenting the above situation. The courts of the Third Circuit itself demonstrate several different approaches. In *United States v. Matthews*, 424 F. Supp. 339 (E.D. Pa. 1976), the defendant moved for a new trial under circumstances that mirror the case at hand — a co-defendant who had pled guilty but had not yet been sentenced before the movant's trial came forward after the movant's conviction and offered exculpatory evidence. The court, instead of analyzing the case under a "due diligence" standard, characterized the evidence as not "newly discovered." 424 F. Supp. at 341. Instead of discussing whether the defendant had access to the evidence for use at his trial, the court focused upon prior courts' exercise of caution as to and disdain for such motions because of alleged possibilities of collusion among co-defendants, citing *Coplin v. United States*, 88 F.2d 652, 665 (9th Cir. 1937), and *United States v. Jacobs*,

475 F.2d 270, 286 n. 33 (2d Cir. 1973). *Cf., LaBelle v. United States,* 86 F.2d 991 (5th Cir. 1936); *McAteer v. United States,* 148 F.2d 992 (5th Cir. 1945).

The circuit court in this case took a different tact and subjected the defendant's actions to strict judicial scrutiny and found fault for lack of "due diligence" (App. A, 9a). The court, whether in an attempt to set a higher standard or merely to avoid the issue, faulted the defendant for not raising an issue which was clear and upon which the trial court implicitly ruled by dismissing the witness. The district court below similarly based its decision upon due diligence grounds but also decided the case on a totally different theory. That court said that the defendant should have requested the government to confer immunity upon Neiman since the government had access to his testimony via 18 U.S.C. §§6001 *et seq.*

The district court's suggestion that the government confer use immunity upon defense witnesses is salutory and would go far in alleviating the problems inherent in this situation. The bona fides of the defendant's initial attempt to obtain the desired testimony would be fully tested, since he would have to make such a request well knowing that it could be granted. Hence, not only would the need for new trial motions in this situation be reduced by the use of the testimony at trial, but the fears of collusion exhibited in *Matthews, Jacobs* and *Coplin, supra,* would also be dissipated. The defendant would not be able to make a facetious motion in anticipation of its denial and thus preserve a claim for a new trial. The benefits of defense-initiated immunity in a trial setting has been much commented upon. *See generally,* Weston, *The Compulsory Process Clause,* 73 Mich. L. Rev. 71, 166-170 (1974); Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses,* 67 Colum. L. Rev. 953 (1967); Comment, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar,* 10 Harv. J. Legis. 74 (1972); Weston, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 Harv. L.

Rev. 567 (1978). *Cf., United States v. Morrison,* 535 F.2d 223 (3d Cir. 1976), *cert. denied,* ___ U.S. ___ ( ). Not only would defense-initiated immunity create an enhanced atmosphere of fairness at trial and substantially aid the Sixth Amendment right of compulsory process, but it would also lend a high degree of certainty to resolving claims such as the one at hand and serve to ferret out such claims as clearly lack merit. Should the court find this meritorious procedure to be mandated by either the compulsory process clause of the Sixth Amendment or the due process clause of the Fifth Amendment, this case should be remanded for a hearing, in lieu of the procedure, on the bona fides of LaDuca's desire for Neiman's testimony.

Since the federal courts have demonstrated inability to resolve under a consistent theory new trial motions stemming from the newly available testimony of a pleading co-defendant who previously and validly invoked his Fifth Amendment privilege against self-incrimination, and since it is peculiarly within this Court's jurisdiction to settle issues arising under the Federal Rules of Criminal Procedure, it is respectfully urged that a writ of certiorari issue so that this Court may give guidance to federal courts in deciding issues of this nature.

III.

Certiorari should be granted to resolve the conflict created by the lower courts' decisions with the standards of due diligence widely held by federal courts.

It is settled doctrine that in order to be granted a new trial on grounds of newly discovered evidence, the defendant must show, *inter alia,* that he exercised due diligence in attempting to get that evidence. *See, e.g., United States v. Stofsky,* 527 F.2d 237, 244 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976). Both the district and the circuit courts in this case imposed upon the defendant a higher degree of due diligence than has heretofore been recognized by the federal courts. The defendant

subpoenaed the witness, had him summoned to court, and mentioned placing the witness on the stand. After the trial court, in exercising its authority over the proceedings, conducted an abbreviated and informal voir dire of the witness, and then implicitly ruled that the witness had a privilege by excusing him from the courtroom, it faulted the defendant for not proposing a novel theory of law in order to show due diligence and thus preserve his right to a new trial. The circuit court, dissatisfied only with the district court's reasoning, imposed the same lofty standard of due diligence in affirming the district court's denial. The circuit court faulted the defendant for not pursuing a facetious legal theory, suggested desperately by the defense only after the proceedings were totally beyond its control and the witness crucial to its case was leaving the courtroom.

The due diligence standard has been said, uncontradictedly, to require ordinary diligence, not the highest degree of diligence. *United States v. Gordon,* 246 F. Supp. 522, 525 (D.D.C. 1965), cited at Wright, *Federal Practice and Procedures,* Criminal §557, n. 16 (1969). In applying the standard, the *Gordon* court granted a new trial when the defendant was able to locate evidence impeaching the complaining witness only after trial. The impeaching evidence was the witness' prior larceny conviction. The defense originally searched police records for it under the witness' names of Horace Leroy Logan, Jr. and Horace L. Logan; the information appeared under the name of Leroy Logan. In granting a new trial, the court said:

> "The attorney for the defendant acted in good faith throughout, although perhaps he was not as imaginative as others might have been under the same circumstances. However, I find that he was diligent in the sense that I understand the term." 246 F. Supp. at 525.

Similarly, in *Coates v. United States,* 174 F.2d 959 (D.C. Cir. 1949), the court found due diligence when defense counsel

repeatedly visited a police station prior to trial in order to try to obtain evidence. *Cf., United States v. West,* 170 F. Supp. 200, 208 (N.D.O. 1959). In *Nagell v. United States,* 354 F.2d 441 (5th Cir. 1966), a new trial was granted when the defendant had knowledge of the newly-discovered evidence but failed to disclose the knowledge to his counsel because of a mental illness. Similar to *Gordon* and *Coates,* LaDuca made every reasonable effort to obtain Neiman's testimony, from bringing him to court to mentioning placing him on the stand. Like *Nagell,* disclosure of the evidence was hindered through no fault of his own — Neiman had a privilege which LaDuca could not overcome. Like *Gordon,* LaDuca could not be expected to suggest to the court the innovative and novel legal theory which, despite its salutary aspects, has been rejected by nearly all of the few courts which have entertained it.

The cases which deny motions for new trials because of lack of due diligence are based upon the availability of the evidence or of leads to the evidence at trial and the defense's failure to pursue that evidence. For instance, in *United States v. Hearst,* 424 F. Supp. 307 (N.D. Cal. 1976), the court denied the motion when the newly-discovered evidence of prior inconsistent statements was available to the defense through previously disclosed grand jury testimony. *Cf., Estes v. United States,* 254 F. Supp. 314, 330-34 (W.D. Tex. 1966), holding lack of due diligence where defendant who had all his mental facilities failed to tell counsel of additional evidence. *See also, United States v. Natelli,* 553 F.2d 5, 7-8 (2d Cir. 1977); *United States v. Schwartzbaum,* 527 F.2d 249, 254 (2d Cir. 1975).

It is clear that the decisions of the district and the circuit courts in this case go beyond those of other cases denying new trial motions in scrutinizing the diligence of the defense in acquiring the evidence for the first trial. The decisions in this case are also clearly contrary to the other federal decisions granting such motions. It is urged that a writ of certiorari be

granted in this case so that the Supreme Court may settle this conflict between the circuits and resolve the issue arising under Fed. R. Crim. P. 33, and thus within this Court's special province.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

s/ Steven H. Gifis
Attorney for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT OF NOVEMBER 14, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 78-1356

UNITED STATES OF AMERICA

vs.

Anthony R. La Duca,

Appellant

Before SEITZ, Chief Judge, ADAMS and ROSENN, *Circuit Judges*
(filed November 14, 1978)

ADAMS, *Circuit Judge*

Anthony La Duca appeals from a denial by the district court of his motion for a new trial, which had been predicated upon newly discovered evidence. La Duca had premised his motion on an affidavit by one John Neiman stating that he was now prepared to testify to La Duca's innocence. Neiman was the other principal participant in the activities for which La Duca had been convicted. The trial judge denied the motion, reasoning that inasmuch as La Duca had not sought to compel Neiman's

testimony at the trial by requesting that the government confer use immunity upon Neiman, he had not exercised the diligence in procuring the newly discovered evidence that is required to prevail on such motion. Although we affirm the order denying the motion for a new trial on the strength of all the facts in the record, we wish to make clear that we do not affirm the proposition advanced by the trial judge since it is contrary to the settled rule of this Court as well as that of other circuits.

La Duca, Neiman, and two other men were indicted in 1975 for conspiring to embezzle money from a union pension fund, for embezzling $100,000 from that fund, and for related offenses. Neiman pleaded guilty to the conspiracy count on November 24, 1975, and La Duca stood trial by himself on the single charge of embezzlement. La Duca was convicted based on a jury verdict entered on January 23, 1976. On March 1, 1976, Neiman was sentenced to three years imprisonment and the remaining counts against him were dismissed. La Duca was sentenced on March 24, 1976, to a three year prison term.[1]

For purposes of this appeal it is necessary to review those aspects of La Duca's trial that relate to Neiman's availability as a witness. Neiman appeared at the trial with his attorney on January 21, 1976, after efforts to locate him were made by both the government and the defense. Neiman's attorney informed the judge that his client would not testify on behalf of either side,

1. This Court affirmed the conviction, United States v. La Duca, 546 F.2d 417 (3d Cir. 1976), and the Supreme Court denied certiorari, 430 U.S. 965 (1977). La Duca's sentence was subsequently reduced to eighteen months.

and that if called to the stand, Neiman would invoke his privilege against self-incrimination. Counsel also stated that he had apprised both sides of this position when they sought Neiman's testimony. The judge asked Neiman if he would invoke the privilege against self-incrimination if he were called, and Neiman answered in the affirmative. Defense counsel moved to have Neiman invoke the privilege in the presence of the jury, but the judge denied the motion on the ground that invocation of the privilege is a matter of no legal significance.[2]

Neiman was excused and left the courtroom. Then, defense counsel pointed out that although several counts were still open against Neiman, in view of the fact that Neiman had already pleaded guilty to one count as part of a plea bargain to dismiss the remaining counts, he might not be able to invoke the fifth amendment. The judge reprimanded defense counsel for not raising the point before Neiman was dismissed, but agreed to examine Neiman if he were brought back. However, Neiman could not be found. Defense counsel, after consulting with La Duca on whether he should press the issue, conceded that perhaps Neiman could still invoke the fifth amendment privilege, and let the matter rest.[3]

In October, 1977, La Duca moved for a new trial, pursuant to Federal Rule of Criminal Procedure 33, based on newly

2. Appellee's Supplemental Appendix at 35b-41b.

3. *Id.* at 43b-51b.

discovered evidence. His motion was accompanied by an affidavit in which Neiman declared that he was now willing to give testimony that would exculpate La Duca, and explained that he had not appeared at trial on La Duca's behalf because at that time he was still in jeopardy on the open counts of the pending indictment and feared that if he testified a more severe sentence would be imposed on him in retaliation for his testifying.

To prevail on a motion for a new trial on the ground of newly discovered evidence, a defendant bears the heavy burden of establishing five requirements:

> (a) the evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such and of such, nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.[4]

The district court based its denial of the motion for a new trial upon La Duca's failure to meet the second requirement, stating that La Duca had not been diligent in attempting to obtain the evidence prior to the conclusion of his trial since La Duca had not requested that the government confer use immunity upon Neiman.

4. United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976), *quoting* United States v. Howell, 240 F.2d 149, 159 (3d Cir. 1956).

The trial judge conceded that as the law now stands, "absent special circumstances, the Sixth Amendment imposes no affirmative obligation on the government to confer immunity on a witness in order to make that witness's testimony available to a defendant."[5] Still, the judge asserted, "For me, however, . . . a Sixth Amendment breach would occur."[6] The lower court further posited that even if no sixth amendment obligation existed and even if the court is powerless to compel the government to immunize a defense witness, due process considerations of fairness "mandate that the government request use immunity for a defendant's witness or be barred from prosecuting the defendant."[7] Having laid this groundwork, the district court concluded that since La Duca had not requested the government to immunize Neiman, he had failed to exercise due diligence and consequently was not entitled to a new trial.

We cannot subscribe to the district court's analysis, which rests on two propositions. First, it is maintained that the sixth amendment or the due process clause mandates that the government make use immunity available to a defendant. Second, as a corollary of the foregoing, it is contended that defense counsel does not exercise due diligence in obtaining evidence if he fails to request immunization of a witness who would otherwise invoke the fifth amendment privilege.

5. United States v. La Duca, Crim. No. 75-56, typed opinion at 12 (D. N.J., filed March 10, 1978).

6. *Id.*

7. *Id.* at 13.

Appendix A

The first proposition, though suggested by a number of commentators[8] as a practical solution to the recurring problem of obtaining the allegedly exculpatory testimony of defense witnesses who refuse to incriminate themselves,[9] has been

8. Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 166-70 (1974); Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 Colum. L. Rev. 953, 956 n.19 (1967); Comment, *A Re-Examination of Defense Witness Immunity: A New Use of Kastigar*, 10 Harv. J. Legis. 74, 79 (1972); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 Harv. L. Rev. 1266 (1978).

9. It is contended with a degree of ingenuity that in the aftermath of 18 U.S.C. §§6002 and Kastigar v. United States, 406 U.S. 441 (1972), a practical approach exists for resolving the competing values of the fifth amendment privilege of a witness against self-incrimination and the sixth amendment right of a defendant to have compulsory process for obtaining witnesses in his favor. Traditionally, it has been held that a defendant's right must yield to the witness' privilege, and that the defendant may be tried without the benefit of the exculpatory testimony. *E.g.*, Holloway v. Wolff, 351 F. Supp. 1033, 1037-38 (D. Neb. 1972), *rev'd on other grounds*, 482 F.2d 110 (8th Cir. 1973). Although theoretically the witness could be stripped of his privilege by granting him immunity from prosecution, prior to 1970 such an approach would have severely hampered the efforts of law enforcement authorities, who were at that time required to provide full transactional immunity to prospective witnesses to remove their constitutional privilege. However, in 1970 Congress enacted 18 U.S.C. §6002, which confers only use immunity upon witnesses who are compelled to testify, and this statute was upheld against constitutional attack in *Kastigar*. Since under use immunity the government may still prosecute a witness on the basis of evidence gathered from sources independent of the witness' testimony, it is argued that the

(Cont'd)

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rejected to date by this as well as other courts of appeals. Rather, it has been uniformly accepted that the grant or denial of immunity is within the sole discretion of the executive branch of government, and that neither the courts nor defense counsel may force the prosecutor to compel the testimony of a defense witness.[10] As we recently confirmed in United States v.

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government's interest in withholding immunity is now insufficient to outweigh the defendant's sixth amendment interest in producing exculpatory testimony, and that consequently the government must immunize defense witnesses. *See* Westen, *supra* note 8, at 166-70.

The government maintains that notwithstanding the availability of use immunity, a requirement that it be compelled to immunize defense witnesses would jeopardize its investigations and prosecutions, United States Attorneys Manual §1-11.230 (1977), and urges here that the district court's order denying La Duca's motion for a new trial be affirmed on other grounds.

Thus, neither La Duca nor the government has advanced on appeal the theory propounded by the district court. In view of this fact and in view of the fact that even were this Court now to adopt the first proposition of the district court we would be precluded from affirming the district court's rationale because of our discussion of that court's second proposition, it is inappropriate at this juncture to reconsider the settled rule as enunciated in our earlier opinions.

10. *E.g.*, United States v. Housand, 550 F.2d 818, 824 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977); United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976); United States v. Allstate Mortgage Corp., 507 F.2d 492 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975); United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967) (suggesting, however, at 361 F.2d at 534 n.1 that there may be a due process violation if the prosecution immunizes its own witnesses while

(Cont'd)

Appendix A

Niederberger, No. 77-1575, at 6-7 (3d Cir., filed May 5, 1978):

> The rule in this Circuit is clear; a trial court has no authority to provide use immunity for a defense witness. *United States v. Morrison,* 535 F.2d 223, 228-29 (3d Cir. 1976) *cert. denied,* ____ S.Ct. ____(197__); *United States v. Berrigan,* 482 F.2d 171, 190 (3d Cir. 1973). Similarly, except in an extraordinary circumstance . . . , a trial court cannot compel the Government to offer such immunity to a prospective witness. *Morrison, supra,* 535 F.2d at 229.

(Cont'd)
refusing to immunize defense witnesses). For a lone voice in opposition, see *United States v. Gaither,* 539 F.2d 753 (D.C. Cir. 1976) (statement of Bazelon, C.J., as to why he voted to deny rehearing *en banc*), *cert. denied,* 429 U.S. 961 (1976); *United States v. Leonard,* 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (Bazelon, C.J., concurring and dissenting).

In United States v. Morrison, 535 F.2d 223, 229 (3d Cir. 1976), this Court commented that

> [t]here are circumstances under which it appears due process may demand that the Government request use immunity for a defendant's witness . . . Such a circumstance was created in this case when prosecutorial misconduct caused the defendant's principal witness to withhold out of fear of self-incrimination testimony which would otherwise allegedly have been available to the defendant.

The absence of any suggestion of prosecutorial misconduct in the present case makes *Morrison* inapplicable.

Appendix A

Since the first proposition contradicts the accepted rule of law in this Court, its corollary, the second proposition, must fail. A defendant cannot be faulted for not exercising due diligence to request use immunity if settled case law does not indicate that he could successfully make such a request.

Although we are constrained to disagree with the district court's rationale, we nevertheless affirm the denial of the motion for a new trial because the record provides alternative grounds for refusing to grant the motion.[11] The defense exhibited a lack of due diligence in failing to bring to the judge's attention until after Neiman had departed from the courtroom that the privilege against self-incrimination might no longer be available to Neiman. Whether or not Neiman in fact was still privileged at the time in question is now irrelevant. Since the issue was not clearcut at that time[12] and since the defense did not pursue its

11. *See, e.g.,* PAAC v. Rizzo, 502 F.2d 306, 308 n.1 (3d Cir. 1974), *cert. denied,* 419 U.S. 1108 (1975) ("It is proper for an appellate court to affirm a *correct* decision of a lower court even when that decision is based on an inappropriate ground.") (emphasis in original).

12. On the one hand, it might have been concluded that since Neiman was entitled to "specific performance" of his plea bargain agreement, under which the remaining counts were to be dismissed, Santobello v. New York, 404 U.S. 257, 263 (1972), those remaining counts could not have furnished a basis for Neiman's claim of privilege. On the other hand, this Court has been most reluctant to hold that a witness may no longer invoke the privilege against self-incrimination when any possibility of injury from his own testimony still exists. *See* United States v. Yurasovich, No. 78-1066 (3d Cir., filed July 26, 1978) which was decided after the completion of La Duca's trial.

resolution as part of a sustained effort to compel Neiman's testimony, the defense never discharged its responsibility to act diligently in procuring the evidence on which it now seeks to base its motion for a new trial.

We also note that La Duca has not satisfied the weighty burden of convincing the district court that the newly discovered evidence "would probably produce an acquittal."[13] Neiman's lengthy criminal record, which includes crimes of fraud, would have made him easily impeachable. Particularly reminiscent of the situation in this case, is Neiman's posture in United States v. Crisona, 271 F. Supp. 150 (S.D.N.Y. 1967), *aff'd* 416 F.2d 107 (2d Cir. 1968). There, a co-defendant sought a severance on the ground that Neiman's testimony would exculpate him.[14] Severance was denied and, despite the co-defendant's forecast, Neiman subsequently testified as a government witness.[15] The

13. *See* text accompanying note 4 *supra*.

14. 271 F. Supp. at 153.

15. 416 F.2d at 109.

The trial court in this case expressed similar concern whether a new trial could be predicated upon Neiman's promised testimony:

> Any rule of law which would result automatically in a new trial upon the submission of an affidavit like the one in this case would place tremendous and dangerous power in the hands of a pleading co-defendant. It would enable him to

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defense has made no effort to dispel the inevitable inference from Neiman's past that Neiman's testimony would be unlikely to result in an acquittal.

We have reviewed La Duca's other contentions and find them to be without merit. Accordingly, the order of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

(Cont'd)

> give to a co-defendant who chooses to go to trial the gift of a second chance if the first jury should convict, and this where there is substantial doubt as to whether the witness's testimony was even desired at the time of the original trial and thus substantial doubt as to whether that now-proffered exculpatory testimony is worthy of belief.

United States v. La Duca, Crim. No. 75-56, typed opinion at 10 (D. N.J., filed March 10, 1978).

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY OF MARCH 10, 1978

UNITED STATES of America

v.

Anthony R. LA DUCA.

Crim. No. 75-56.

United States District Court,
D. New Jersey.

March 10, 1978.

STERN, District Judge.

Defendant Anthony La Duca stands convicted of willful embezzlement of funds of the Paper Industry Union Management Pension Fund, in violation of 18 U.S.C. §664. He now moves, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, for a new trial on the ground of newly discovered evidence. The claimed newly discovered evidence consists of the testimony of La Duca's co-defendant John Neiman. Neiman had pleaded guilty and was awaiting sentence at the time of La Duca's trial. Called to the stand by La Duca during trial, Neiman invoked his Fifth Amendment privilege and declined to testify. Now, long after Neiman's sentencing and after denial of several applications for reduction of sentence,

Neiman states that he is prepared to exculpate La Duca by testifying that he, Neiman, alone was guilty of the crime charged. This case thus presents the recurring and troublesome question: Under what circumstances will a new trial be required where an individual who has invoked the privilege against self-incrimination and has not testified at the trial of his co-defendant comes forward after trial and conviction of that co-defendant and purports to be able and willing to give testimony exculpatory of him.

On February 3, 1975, a federal grand jury returned an indictment charging Anthony La Duca, John Neiman, Guido Rocco, and Herman Levine with conspiracy to steal money from a pension fund, in violation of 18 U.S.C. §371; embezzlement of money of a pension fund, in violation of 18 U.S.C. §664; misapplication of bank funds, in violation of 18 U.S.C. §657; and several other crimes. On November 24, 1975, Neiman pleaded guilty to the conspiracy count. On January 19, 1976, the government moved the trial of La Duca on the embezzlement count alone. The charges against Levine and Rocco were eventually dismissed.

The government's proofs at trial showed that La Duca, a disbarred attorney, met Neiman in federal prison where both were incarcerated, La Duca following conviction on federal perjury charges. Their scheme to embezzle pension funds began at least as early as December 1973, when La Duca and Neiman presented to a New Jersey bank a $100,000 check drawn on an account of the Paper Industry Union Management Pension Fund and payable to the pension fund. Neiman introduced

himself to the bank officers as a financial consultant to the pension fund, a position which he did not hold, and he exchanged the check for a $100,000 certificate of deposit payable to the fund. Shortly thereafter, Neiman and La Duca returned to the bank and proposed another transaction. This time they possessed three $100,000 checks drawn on the fund and payable to the bank. They requested that the bank issue three $100,000 certificates of deposit — two payable to the pension fund and one payable to Playmate Enterprises, Inc., a corporation formed by Neiman and La Duca. The bank officers informed Neiman and La Duca that the bank could not issue a certificate of deposit to a private corporation on a check drawn against a pension fund, and refused to participate in the proposed transaction.

Neiman and La Duca took their business elsewhere. According to the testimony of Guido Rocco, then president of the Totowa Savings and Loan Association, they took the three checks to his bank. They proposed to Rocco the same transaction proposed to the first bank. Initially, the Totowa bank was not interested in the transaction because it was not the payee of the checks. La Duca and Neiman left and returned with pension fund checks made payable to the Savings and Loan. They again sought to have the bank issue certificates of deposit, one to the fund, and one to Playmate Enterprises. Rocco advised them that his bank could not do that without a written resolution from the pension fund or cashier's checks in lieu of the pension fund checks. Neiman and La Duca obliged and had one of the checks exchanged for a cashier's check, thereby

disguising the source of the funds. The Totowa bank accepted the checks and issued two certificates of deposit, one payable to the fund and the other payable to Playmate Enterprises, Inc.

Neiman and La Duca immediately borrowed $80,000 against the certificate of deposit that was payable to Playmate Enterprises, Inc. This money was deposited in Playmate's checking accounts. Twenty thousand dollars was immediately drawn out in cash. Within several months, the remainder of the money had been withdrawn from the Playmate accounts on checks signed by Neiman and/or La Duca and payable in large part to cash.

La Duca took the stand. His defense was that he was without criminal intent. He testified that he believed that Neiman was authorized to possess monies of the pension fund and to invest them in commercial ventures like Playmate Enterprises, Inc.

The jury deliberated less than two hours and returned a verdict of guilty. The conviction was affirmed by the Court of Appeals for the Third Circuit. Certiorari was denied. La Duca was sentenced to a three-year term; on Rule 35 motion, the sentence was later reduced to 18 months. The defendant is presently incarcerated.

The motion now before the Court is based on the affidavit of John Neiman. Neiman therein states that La Duca approached him early in 1973 with an idea for a business venture. Neiman told La Duca that he would be interested in a

partnership and that he, Neiman, could obtain all necessary financing. He states that in late 1973 he was approached by Theodore Potash who offered, for a fee, to introduce him to a source of investment capital. Potash introduced him to James Fabio, the administrator of the pension fund. Fabio was Neiman's source for the checks. In return, Neiman paid Potash and Fabio. According to the Neiman affidavit:

> La Duca had no knowledge of these meetings, nor did he have knowledge of how, where, or why the money was given to me. . . .

Neiman affidavit, Sept. 20, 1977, Para. 8.

Neiman further states that:

> Prior to and at the actual time of receipt of the money by me, both La Duca and his wife interrogated me regarding the propriety of the funds and I assured them that it was a perfectly legal business transaction and that the unions made investment loans every day of the year. . . . I am convinced that if the La Duca's were remotely aware that the loans were even tainted by illegality, they would have disassociated themselves from our business ventures immediately.

Id., Para. 10.[1]

This Court is entitled to view with some skepticism a motion for a new trial based on "newly discovered evidence" which exists only because a convicted defendant who had earlier availed himself of his privilege not to testify comes forward later with an affidavit in which he states that he is not prepared to exculpate his co-defendant. Such a claim is inherently suspect. *See United States v. Jacobs,* 475 F.2d 270, 286 n. 33 (2nd Cir.) (Friendly, C.J.), *cert. denied,* 414 U.S. 821, 94 S.Ct. 116, 38 L.Ed2d 53 (1973).

Under some circumstances, the granting of a new trial so that such testimony can be presented to a jury is a result which is just and proper. But in the great majority of cases there is an unspoken premise which, once recognized, must cause a court to proceed with caution.

The Court cannot be blind to the real possibility that the defendant who stood trial did not genuinely desire that his pleading co-defendant testify at that trial, and thus that the new evidence is not worthy of belief.

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1. Neiman's position is, in part, corroborated by the affidavit of Stuart Vort dated August 30, 1977. In his affidavit, Vort states that in January of 1974, while in La Duca's office, he overheard a conversation between Neiman and La Duca in which "Neiman repeatedly assure [sic] La Duca about the accessability [sic] and legality of the financing obtained and to be obtained by Mr. Neiman." He further states that he did not reveal to La Duca the fact that he had overheard this conversation until after La Duca's conviction.

The co-defendant who has admitted his guilt and who is awaiting sentencing is concerned with what the sentencing court will do. That very concern is a potent guarantee of trustworthiness. Once sentence is imposed, however, there is very little to deter the pleading co-defendant from untruthfully swearing out an affidavit in which he purports to shoulder the entire blame. In these circumstances, the possibility of a successful prosecution for perjury is not a sufficient guarantee of trustworthiness. If the new trial motion is granted, two new trials would be required. If the motion for a new trial is denied, a perjury prosecution would probably require a replay of the original trial to establish the untruthfulness of the affiant's statements. Most prosecutors do not have the resources to constantly retry the same issues against the identical defendants.

If a pleading defendant invokes his privilege against self-incrimination at his co-defendant's trial, his testimony does, of course, become unavailable. But there is every likelihood that at that point in time, his testimony was unwanted as well, and what was desired instead was an issue for appeal or for a new trial motion later.

In La Duca's case, the record strongly suggests that this scenario is not a mere hypothetical. The transcript of trial clearly indicates that La Duca had no genuine wish to put Neiman on the witness stand.

During the course of La Duca's trial, counsel for La Duca proposed instead to introduce Neiman's exculpatory statements through the testimony of attorneys who were present at a post-

indictment, pre-trial strategy meeting. The attorneys would have testified, or so it was represented, that Neiman had told them that La Duca was innocent of the charges and that La Duca did not know the source of the funds.

The Court advised that if the government called Neiman as a witness, the defense could, of course, confront Neiman with these statements. If Neiman admitted having made them, there would be no need to call the lawyers to testify. If Neiman denied them, the Court indicated that the defense could impeach him with the prior inconsistent statements.

Counsel for La Duca wanted to know what would happen if the government chose not to call Neiman. The Court suggested that, in that event, the defense could call Neiman and introduce the evidence through him. Counsel for La Duca ignored the suggestion, making clear to the Court that under no circumstances did he want Neiman himself on the stand. Counsel for La Duca reiterated his view that the lawyers' testimony was crucial, whether or not Neiman was called to testify. The Court restated its view that the proper way to get Neiman's testimony before the jury was to call Neiman to the stand.

By this time, the government had disclosed that it had no intention of calling Neiman to testify. Counsel for La Duca still balked at the idea of calling him and, instead, asked that the Court *direct* the government to call Neiman. The Court noted that it was without authority to tell the government what

witnesses to call but that it stood ready and willing to enforce the defendant's subpoena power if La Duca wanted to call Neiman.[2]

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2. The text of the relevant exchange is as follows:

MR. LUCIANNA: [counsel for La Duca] If your Honor please, I understand that there was a meeting at the office of an attorney by the name of Miles Feinstein from Paterson, attended by Mr. Querques, Mr. Greenberg and Mr. Naiman, [sic] and that at that meeting statements were made by Naiman to the effect that this defendant, Anthony La Duca, was absolutely innocent of these charges, that he in fact didn't know where these funds came from, and that he, Mr. Naiman, would acknowledge that he and he alone was the one who converted these union funds and no one else and more especially not the defendant Anthony La Duca.

Now, if your Honor please, I fully propose to bring Mr. Querques and/or Mr. Feinstein or both of them into court and have them testify to this conversation which took place.

THE COURT: All right. . . . if Mr. Naiman testifies for the Government you will first, of course, confront him with this. If he admits saying it there may be no need to call the lawyers for you will establish through the witness himself.

If the witness denies it, then I think clearly you would be entitled to impeach him on the basis of a prior inconsistent statement and you may introduce that evidence.

Fair enough?

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(Cont'd)

MR. LUCIANNA: Yes. Supposing they don't call him?

THE COURT: Pardon me?

MR. LUCIANNA: Supposing they don't call Mr. Naiman?

THE COURT: Then you can call Mr. Naiman.

MR. LUCIANNA: Well, if your Honor please, I think the testimony of these two lawyers is very important in this case whether or not Mr. Naiman is called.

THE COURT: Sir, please.

MR. LUCIANNA: I think it was made under such a time and under such a circumstance that it goes completely to the heart of this case, namely, whether the defendant La Duca is guilty of any conversion of union funds.

THE COURT: Please. A first year law student would say in response that the statement made in the offices of the attorney is hearsay, that you may certainly use that hearsay if you have an exception to the hearsay rule such as if Naiman takes the stand and testifies in a contradictory manner to that, he may be impeached by a prior inconsistent statement.

But . . . , If Naiman doesn't testify, you just can't call lawyers in to say what Naiman said when Naiman was not under oath, when Naiman was not available for cross-examination.

(Cont'd)

Appendix B

(Cont'd)

In the event you want that testimony you call Naiman and if they don't —

MR. LUCIANNA: If your Honor please, most respectfully, I think I have the right to call him regardless of whether the Government calls him or I call him.

* * *

THE COURT: You just have said two contradictory things. If you feel as strongly as your statement and particularly your tone of voice indicates that you do, that the jury should in your words have the benefit of Mr. Naiman's testimony, by all means call him to the stand if the Government doesn't. *The Court will do everything in its power to facilitate your task*, that being to present Mr. Naiman's testimony.

But if all you want to present is what Mr. Naiman may have said to a group of lawyers, . . . that is not presenting Mr. Naiman's testimony. That is just presenting what Mr. Naiman happened to say sometime outside of court when he wasn't testifying at all. This issue may be academic anyway. Let me find out, are you going to call Naiman?

MR. PLAZA: [Prosecuting Attorney] No, sir.

MR. LUCIANNA: There you are.

THE COURT: Then it isn't academic. They are not calling Naiman.

* * *

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Appendix B

(Cont'd)

MR. LUCIANNA: I think you should direct the Government to call him as their witness. He has pleaded guilty before your Honor in this case. He definitely is in possession of knowledge germane to the issues which are being tried in this court and yet the Government is not to call him as their witness.

If your Honor please, those were the extra-ordinary circumstances under which I decided to bring Mr. Querques and Mr. Feinstein into court and have them testify as to what transpired in their office at the time this man Naiman said unequivocally that my client was innocent of these charges.

THE COURT: . . .

I have no authority to tell the Government who to call as witnesses. I've got authority to make sure they don't suppress evidence in the sense that you become aware of whatever evidence there is. I've got authority so that no one can place any impediments in your path in introducing any evidence which you believe to be relevant to your case.

I have no authority to tell the Government to try not only their case but to try your case as well. I'm unaware of any federal precedent but if you know of one you can cite it to me by which a court can tell the Government it must call witnesses to the stand who are not only favorable to its cause but unfavorable as well.

You don't lack the subpoena power. I stand full force behind you ready to enforce the orders of the court for your benefit. You may call anybody to the stand whom you believe to have evidence which is useful to your case. Do so, if you believe so.

But you cannot require your adversary to call witnesses which may be favorable to your cause. . . .

(Trial transcript, January 20, 1976, 2.114-2.121 [emphasis supplied]).

Later that day, counsel for La Duca stated that he had contacted Neiman's attorney who had advised that he would not permit his client to testify. Counsel for La Duca indicated that he did not have Neiman's address. The defense was still not anxious to take any steps to get Neiman into court. The following exchange occurred:

> THE COURT: How can I be of service to you? Do you want Mr. Neiman to come in here?
>
> MR. LUCIANNA: I think he should be brought in, if your Honor please, as the Court's witness, or I will call him. If your Honor decides, I will call him.
>
> THE COURT: Wait a minute. Let's take one step at a time. I'm not calling witnesses but I will facilitate in any way I can your calling of any witness that you want to.
>
> MR. LUCIANNA: Yes, sir.
>
> THE COURT: I cannot prevent any witness from invoking any legitimate privilege that the witness has.
>
> MR. LUCIANNA: I understand.
>
> THE COURT: But on the other hand I can at least guarantee that the full process of the

> court will be available to you to bring in anybody you desire. Do you want Mr. Neiman in court?
>
> MR. LUCIANNA: Yes, sir.

(Trial transcipt, January 20, 1976, 2.217-2.218.) Neiman appeared the following day. When asked by the Court whether, if called to the stand, he would testify, Neiman indicated that he would invoke his privilege against self-incrimination. (Trial transcript, January 21, 1976, 3.7-3.8.) Neiman was then excused by the defendant without any application that the government or Court make Neiman's testimony available by conferring immunity upon him.

Where the record demonstrates or strongly suggests that the defendant did not desire originally to present the testimony of the witness who invoked the Fifth Amendment, it may not even be appropriate to call the evidence newly discovered or newly available when that witness later reports that he now agrees to speak. At the very least, because the possibility of fraud and collusion is so great, strict scrutiny must be brought to bear on an application like the instant one.

An analogous situation exists in a multi-defendant case where one defendant moves for severance on the ground that he desires the testimony of a co-defendant who declines to give up his right to refuse to testify at his own trial. The law has developed to meet this situation by imposing a high standard on the defendant who seeks severance on such grounds. Among other things, the defendant who seeks severance must show a

bona fide intent to have his co-defendant testify and must show a likelihood that, if severance is granted, the co-defendant will in fact testify. *See, e.g., United States v. Rosa,* 560 F.2d 149, 155 (3rd Cir.), *cert. denied, Sica v. U. S.* , 434 U.S. 862, 98 S.Ct. 191, 54 L.Ed.2d 135 (1977). The Court notes that there is no guarantee whatsoever that, if the Court were to grant La Duca's motion for a new trial, Neiman would testify for him. Nothing stands in the way of yet another change of heart by Neiman, *after the conviction of La Duca is vacated,* when the case against La Duca is called to trial again.

Any rule of law which would result automatically in a new trial upon the submission of an affidavit like the one in this case would place tremendous and dangerous power in the hands of a pleading co-defendant. It would enable him to give to a co-defendant who chooses to go to trial the gift of a second chance if the first jury should convict, and this where there is substantial doubt as to whether the witness's testimony was even desired at the time of the original trial and thus substantial doubt as to whether that now-proffered exculpatory testimony is worthy of belief.

There is a clear path out of this dilemma. It is black letter law that, to establish entitlement to a new trial on the ground of newly discovered evidence, the defendant must show that his failure to learn of the evidence prior to the conclusion of the first trial was not a result of any lack of diligence on his part. *See United States v. Iannelli,* 528 F.2d 1290, 1292 (3rd Cir. 1976); *United States v. Meyers,* 484 F.2d 113, 116 (3rd Cir. 1973); *United States v. Bertone,* 249 F.2d 156, 160 (3rd Cir. 1957).

Where the newly discovered evidence is really newly *available* evidence which was known all along, the defendant can demonstrate his due diligence — and more importantly, can establish the *bona fides* of his otherwise suspect claim that he truly wanted this witness to testify at his first trial — by requesting that the government have immunity conferred on the witness pursuant to 18 U.S.C. §§6001 *et seq.* (Supp. 1973).

It has often been noted that the decision to seek immunity or not for a particular witness rests within the sole discretion of the prosecutor. *See, e.g., United States v. Housand,* 550 F.2d 818, 824 (2nd Cir. 1977), *cert. denied,* 431 U.S. 970, 97 S.Ct. 2931, 53 L.Ed.2d 1066 (1977). The Court is without power to grant immunity except upon his or her request. *United States v. Berrigan,* 482 F.2d 171, 190 (3rd Cir. 1973). This is, of course, the statutory scheme now in force. No doubt it reflects concern about judicial usurpation of the executive's prosecutorial role. Until 1970, when the federal immunity statutes resulted in the conferring of complete, transactional immunity on a witness, the courts' adamant refusal to interfere in any way with the government's decision to grant or to withhold immunity was easy to understand. The enactment of 18 U.S.C. §§6001 *et seq.,* however, which provides only for the grant of use immunity, has operated to change the balance. *But see United States v. Allstate Mortgage Corp.,* 507 F.2d 492 (7th Cir. 1974), *cert. denied,* 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975). Testimonial "use" immunity is sufficient to vindicate fully a witness's Fifth Amendment rights, but it does not operate to foreclose future prosecutions. *Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). A grant of immunity thus does not

infringe upon the government's interest in law enforcement to the extent that transactional immunity would. The availability of use immunity can protect the government's interest in potential future prosecution of a witness while also satisfying the interest of the criminal defendant in the presentation of testimony which can exculpate him. *See generally,* Note, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses,* 67 Colum.L.Rev. 953 (1967).

The Sixth Amendment to the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ."

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

The courts have generally agreed that the defendant's Sixth Amendment right of compulsory process must give way to the subpoenaed witness's personal Fifth Amendment right against self-incrimination. *See Royal v. Maryland,* 529 F.2d 1280, 1283 (4th Cir. 1976) (Winter, C.J., dissenting); *United States v. Lacouture,* 495 F.2d 1237, 1241 (5th Cir.) (on petition for rehearing), *cert. denied,* 419 U.S. 1053, 95 S.Ct. 631, 42 L.Ed.2d 648 (1974); *United States v. Gomez-Rojas,* 507 F.2d 1213, 1220 (5th Cir.), *cert. denied,* 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975); *Holloway v. Wolff,* 351 F.Supp. 1033, 1038 (D.Neb.1972), *rev'd on other grounds,* 482 F.2d 110 (8th Cir. 1973); *cf. Murdock v. United States,* 283 F.2d 585, 587 (10th Cir. 1960). Of course, the government's power to confer immunity on a witness under section 6001, and thus to compel his testimony while preserving his Fifth Amendment right, renders it unnecessary to choose between vindication of one individual's Fifth Amendment right and another individual's Sixth Amendment rights.

Nevertheless, the courts have generally suggested that, absent special circumstances, the Sixth Amendment imposes no affirmative obligation on the government to confer immunity on a witness in order to make that witness's testimony available to a defendant. *See United States v. Alessio,* 528 F.2d 1079 (9th Cir.), *cert. denied,* 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976); *United States v. Lacouture, supra; United States v. Jenkins,* 470 F.2d 1061 (9th Cir. 1972), *cert. denied,* 411 U.S. 920, 93 S.Ct. 1544, 36 L.Ed.2d 313 (1973).[3]

3. Generally, the Sixth Amendment's guarantee of compulsory process has not been construed as entitling the defendant to any more than the physical presence of the witness. Yet, the amendment has been recognized as the source

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For me, however, if a court did find that the testimony of a witness invoking privilege would exculpate a defendant, and the government withheld the immunity which would make that testimony available to the defendant even while insisting on continuing to prosecute him, a Sixth Amendment breach would occur. *See generally*, Westen, *The Compulsory Process Clause*, 73 Mich.L.Rev. 71, 166-170 (1974). Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 Colum.L.Rev. 953, 956 n. 19 (1967); Comment, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 Harv.J.Legis. 74, 79 (1972). *See also* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv.L.Rev. 567 (1978).

Even if the view be taken that the Sixth Amendment imposes no affirmative obligation on the government to take those steps which it alone can take to make available to a defendant the testimony of a particular witness, and even if the Court is powerless to compel the government to immunize a defense witness, it is clear to me that there are circumstances where considerations of fairness, and thus of due process, mandate that the government request use immunity for a defendant's witness or be barred from prosecuting the defendant. *Cf. United States v. Morrison*, 535 F.2d 223, 229 (3rd Cir. 1976). *See also United States v. Gaither*, 176 U.S.App.D.C. 274, 539

(Cont'd)
of the government's affirmative obligation under Rule 17 of the Federal Rules of Criminal Procedure to pay for the trial expenses and fees of witnesses of indigent defendants. *See Taylor v. United States*, 329 F.2d 384, 386 (5th Cir. 1964).

F.2d 753 (1976) (statement of Bazelon, C.J., as to why he voted to deny rehearing *En Banc*), *cert. denied*, 429 U.S. 961, 97 S.Ct. 388, 50 L.Ed.2d 329 (1977); *United States v. Leonard*, 161 U.S.App.D.C. 36, 66, 494 F.2d 955, 985 n. 79 (1974) (Bazelon, C.J., concurring and dissenting); *Earl v. United States*, 124 U.S.App.D.C. 77, 80, 361 F.2d 531, 534 n. 1 (1966) (Burger, J.), *cert. denied*, 388 U.S. 921, 87 S.Ct. 2121, 18 L.Ed.2d 1370 (1967); McCormick, *Handbook of The Law of Evidence*, §143 at 308 (2d ed. E. Cleary 1972).

If the defendant requests that the government confer immunity so that the defendant can have the testimony of a witness he desires, and the government honors the request, the desired testimony will immediately become available and there will be no later claim for a new trial on the ground of newly discovered evidence. If, on the other hand, the defendant requests that the government grant immunity and the government refuses, the court can, at that point, determine whether the defendant can get a fair trial without this witness, and may dismiss the indictment if it determines that a fair trial cannot be had.[4]

The interests of all parties can be accommodated. The use-restriction immunity statute is not, by its terms, limited to

4. The court may, of course, determine that notwithstanding the unavailability of the witness upon whom the government refuses to confer immunity a fair trial may be had and may permit the trial to go forward. The determination may be based on a proffer by the defendant of what the testimony of the witness would be, *supported by a showing that the profferer has good reason to know*. The court could then determine if the trial could fairly proceed. Even if it does, the government will then bear the risk that, later on, a new trial motion like the present one will be brought and will be granted.

witnesses who testify on behalf of the government. Rather, it is to be employed when "testimony . . . from such individual may be necessary to the public interest . . ." 18 U.S.C. §6003(b)(1). The public interest is surely advanced where all testimony relevant to ascertaining the defendant's guilt or innocence is available. And the operation of use immunity — as contrasted with transactional immunity — results in no substantial sacrifice of the public interest in the future prosecution of witnesses who are themselves implicated in crimes.[5]

Even assuming, as the government argues, that the grant of use immunity renders more difficult future prosecution of an immunized witness who has not yet been convicted, that may be the price it has to pay to prosecute the defendant. Where a potential witness, who is also a potential defendant, has evidence which a court finds could exculpate another — even if it is true that *testimonial* immunity could cost the government something — his continued silence could cost the accused everything. The shifting of costs to the criminal defendant is simply not consistent with fundamental notions of fairness. And, to the extent that the defendant wilfully attempts to abuse his right in order to give an immunity bath to his cohorts, a sentencing judge need not be blind to what has happened.

Because La Duca failed to request that the government seek use immunity for Neiman, he failed to take those steps necessary to secure the availability of the evidence which he now claims is

5. This is particularly true in the case of an already convicted co-defendant, who even then receives only testimonial immunity.

newly available. He thus has failed to establish that his new evidence entitles him to a new trial. *See United States v. Alper,* 449 F.2d 1223 (3rd Cir. 1971), *cert. denied,* 405 U.S. 988, 92 S.Ct. 1248, 31 L.Ed.2d 453 (1972).

The cases upon which La Duca relies — *Amos v. United States,* 95 U.S.App.D.C. 31, 218 F.2d 44 (1954); *Ledet v. United States,* 297 F.2d 737 (5th Cir. 1962); and *United States v. Guillette,* 404 F.Supp. 1360 (D.Conn.1975) — shout out to be distinguished. *See also Newsom v. United States,* 311 F.2d 74 (5th Cir. 1962). *Amos* is not a Fifth Amendment case. In the others, the court which granted a new trial identified cumulative trial errors or irregularities, found exceedingly thin evidence of guilt, and made manifest its sense that the convicted defendant may have in fact been innocent. It appears that the newly available evidence doctrine was used as a vehicle to correct what the courts perceived to be an unjust result. That is not the case here.

Defendant's motion for a new trial will, accordingly, be denied.

APPENDIX C — AFFIDAVIT OF JOHN NEIMAN FILED WITH THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ON OCTOBER 5, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

v.

ANTHONY R. LA DUCA,

Defendant.

STATE OF)
ss
COUNTY OF)

Criminal No. 75-56

JOHN NEIMAN, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am one of the defendants in the above-captioned criminal indictment.

2. On November 29, 1975, I pleaded guilty to Count One of the above said indictment, which charged me with conspiracy to convert union pension funds to my own use. At the time of my plea, the Government represented to me that it would move for a dismissal of the remaining Counts against me at the time of my sentencing.

Appendix C

3. After my plea of guilty and before the trial of my co-defendant, Anthony R. La Duca, I had many meetings and telephone conversations with La Duca and with Mr. Frank Lucianna, La Duca's trial attorney, the substance of which I indicated that I would testify on La Duca's behalf at his trial.

4. On January 20, 1976, I was summoned to appear as a witness by La Duca, however, my attorney advised me that because I was still in jeopardy on the open counts of the pending indictment and because I was in fear that by testifying, I would receive the maximum sentence of five years in prison, I refused to testify.

5. I regret not having testified on La Duca's behalf when summoned, because I now realize that my failure to testify resulted in the unjust conviction of an innocent person causing him and his family undeserved heartaches.

6. It is my understanding that La Duca appealed his conviction and that his appeal was not successful. I had hoped that his conviction would be reversed, so that I may have an opportunity to testify as to my knowledge of his innocence, now that my former jeopardy is no longer existent.

7. La Duca approached me in the early part of 1973 with a business transaction involving the purchase of a chain of gas stations. After discussing the transaction I agreed with him that his idea was both feasible and profitable and advised him that I would be interested in an equal partnership with me obtaining the finances that were required and La Duca doing the necessary paperwork.

Appendix C

8. During the latter part of 1973, I was approached by Theodore Potash, who informed me that he had a source of investment capital and that he would introduce me to the source for a fee of one percent of any money that would be advanced by the source. I readily agreed and I was introduced to Mr. Fabio, the Administrator of the Paper Industry Union Management Pension Fund. As a result of these meetings, I obtained, on different occasions, six checks each in the sum of $100,000.00 and paid Potash a total of $7,000.00 and Fabio a total of $20,000.00. La Duca had no knowledge of these meetings, nor did he have knowledge of how, where, or why the money was given to me. The only thing I told La Duca was that I was paying a one percent finders fee for the money to Potash. La Duca did not know, nor did he ever meet, nor did he ever communicate with either Potash or Fabio, nor did he have any knowledge of my arrangements with them.

9. When I obtained the money, I took the sum of $20,000.00 cash, which I subsequently gave to Mr. Fabio and two checks which I gave to Potash. At the time, I told La Duca that I needed the cash for another business transaction.

10. Prior to and at the actual time of receipt of the money by me, both La Duca and his wife interrogated me regarding the propriety of the funds and I assured them that it was a perfectly legal business transaction and that the unions made investment loans every day of the year. They were both convinced when I obtained a Chase Manhattan Treasurer's Check in the sum of $100,000.00. I am convinced that if the La Duca's were remotely aware that the loans were even tainted by illegality, they would have disassociated themselves from our business ventures immediately.

Appendix C

11. The money which I used to finance our corporation was given to me personally by Mr. Fabio, and I was responsible for the repayment of it. After I deposited the money into our corporation, I directed the distribution of it, taking what I needed, when I needed it, without explaining to La Duca what I did with it. I authorized La Duca to take a salary, pay office expenses, pay Herman Levine $12,000.00, bought him a car and miscellaneous other expenditures made by La Duca at my direction.

Our corporation had entered into several negotiations and agreements regarding the investment of the money in question and had it not been for the investigation being conducted into the affairs of the Pension Fund and one Loretta Lustig, who apparently obtained in excess of $900,000.00 in a similar fashion from Potash and Fabio, further funds would have been advanced to me by the Pension Fund with which to complete my business transactions successfully and the Pension Fund would have been repaid the money together with a profit.

12. During the month of May or June of 1976, I made an informal application to Judge H. Stern for a reduction of sentence and in my letter, I advised him that I was solely responsible for the illegal obtaining of the Pension Funds and its distribution and La Duca was totally innocent of any wrongfoing in the misuse of the money.

13. I sincerely regret having implicated La Duca in this matter and I regret even more, my selfish reasons for not testifying on his behalf when summoned by him at his trial. It

was always my intention to profitably invest the money I obtained from the Paper Industry Union Management Pension Fund and to repay with a profit the money borrowed by me.

14. I make this affidavit freely, voluntarily and without promise or reward from anyone, in a sincere effort to induce the Court to grant the defendant, Anthony R. La Duca, a new trial, so that I may take the witness stand on his behalf and testify as to my knowledge in this matter.

s/ John Neiman
JOHN NEIMAN

Sworn and subscribed to this
20th day of September, 1977.

s/ Patricia Williams
Parole Officer - Authorized by
Act of July 7, 1953 to admin-
ister oaths